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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

Nos. 221 & 222 Misc.

PEOPLE ex rel. TONY MARINO,
Petitioner,

vs.

JOSEPH E. RAGEN, Warden, etc.,
Respondent,

and

TONY MARINO,
Petitioner,

vs.

STATE OF ILLINOIS,
Respondent.

On petition for writ of certiorari to the Supreme Court of Illinois.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

In 1925 petitioner pleaded guilty in the circuit court of Winnebago County, Illinois, to the crime of murder. After a statutory hearing on aggravation and mitigation, peti-

tioner was sentenced to imprisonment in the Illinois State Penitentiary for the term of his natural life.

Petitioner, assailing his conviction as a denial of due process of law, seeks nullification of the sentence upon which he is now incarcerated in the Illinois State Penitentiary.

In the two cases now before this Court, the Supreme Court of Illinois

(1) denied petitioner's original application for a writ of *habeas corpus,* and

(2) affirmed on writ of error the petitioner's conviction, only the common law record being before the court on this writ of error.

The habeas corpus proceeding before Judge Dusher, and this Court's review of those proceedings.

In 1947, petitioner, asserting that his conviction was without due process of law, filed *pro se* his petition in the circuit court of Winnebago County for that court's writ of *habeas corpus.* The circuit court of Winnebago County, overruling the State's objection that *habeas corpus* was not an appropriate means of collaterally attacking petitioner's conviction, issued the writ, heard petitioner's evidence, and at the conclusion of petitioner's evidence, quashed the writ and remanded him to the custody of the warden.

Petitioner sought this Court's writ of *certiorari* to review the circuit court's judgment of quashal of the writ and remandment.

The predecessor of the present Attorney General, conceiving that the granting of the writ adjudicated the propriety of the remedy on State grounds not reviewable here

and conceiving that *on the evidence then in the record,* due process had been denied, confessed error.

This Court, *acting solely on the evidence then in the record and on the confession of error,* vacated the judgment and remanded the cause to the circuit court of Winnebago County "for appropriate proceedings in the light of the confession of error filed by the Attorney General of the State of Illinois."

Thereupon Judge Dusher had a full hearing, at which he not only entertained petitioner's evidence but received evidence in rebuttal offered on behalf of the respondent warden.

On the basis of this full and complete hearing, Judge Dusher reached the conclusion, supported by evidence that was adduced at the full hearing but that had not been adduced at the prior hearing, that petitioner had had legal counsel, voluntarily confessed after conferring with counsel, intelligently pleaded guilty, threw himself upon the mercy of the court in an effort to escape the death penalty and achieved that object when he received a sentence of life imprisonment.

This Court denied *certiorari.* (*Marino* v. *Ragen,* on May 2, 1949. Vol. 9, Sup. Ct. Bul. No. 30 Misc.)

In the instant writ of error case, the Illinois Supreme Court merely followed its inveterate rule that it will not upon a common law record determine whether the right to counsel was intelligently waived at the time of a plea of guilty. *People* v. *Carter,* 391 Ill. 594, writ of *certiorari* granted, but dismissed, *Carter* v. *Illinois,* 329 U.S. 173. *People* v. *Loftus,* 395 Ill. 479, *certiorari* granted, but dismissed, *Loftus* v. *Illinois,* 337 U.S. 935. Of course petitioner's assignment of error with respect to the mode of impanelling the grand jury that indicted him raised no Federal question.

In the instant *habeas corpus* case, the Illinois Supreme Court stated that the granting of its writ of *habeas corpus* is discretionary, that it will not entertain contested questions of fact, and declined to review Judge Dusher's findings, conclusion and judgment. To have employed the Illinois Supreme Court's writ of *habeas corpus* as a means of reviewing the record made before Judge Dusher would have violated the well settled Illinois rule that the record of a trial court's decision in *habeas corpus* is not reviewable by the Supreme Court of Illinois. *People* v. *Loftus*, 400 Ill. 432; *People* v. *Siman*, 284 Ill. 28. It would also have violated the equally well settled rule that the Illinois Supreme Court will not on *habeas corpus* resolve contested issues of fact; for Judge Dusher's opinion rested upon his resolution of direct conflicts in the evidence.

Thus no substantive constitutional question was decided by the Supreme Court of Illinois; for refusal to review another court's decision does not import decision, but on the contrary, imports *refusal to decide* the merits of the case. Hence no substantive constitutional question is justiciable now.

The Question Presented.

The Question presented is:

> Did the Illinois Supreme Court decide, *or did it refuse to decide,* any Federal constitutional question, resting that refusal upon adequate grounds of State law?

SUMMARY OF ARGUMENT.

I.

The circuit court's quashal of its writ of habeas corpus and remandment of petitioner was an adjudication upon the merits with respect to which this court denied certiorari.

II.

In the writ of error case the Illinois Supreme Court did not decide, but on the contrary refused to decide, any Federal constitutional question.

III.

The Illinois Supreme Court did not review, but on the contrary declined to review, the record made before Judge Dusher. Therefore its decision resolved no Federal question and rests upon an adequate State ground.

ARGUMENT.

I.

The circuit court's quashal of its writ of habeas corpus and remandment of petitioner was an adjudication upon the merits with respect to which this court denied certiorari.

Judge Dusher's opinion commences as follows:

> "I have construed that mandate" [i. e., this Court's original mandate] "to mean that this Court should have a full and complete hearing of what transpired in the case of the *People of the State of Illinois* against *Tony Marino,* No. 5963, in this Court, which I will hereafter refer to as the Murder case."

Although Judge Dusher did express the view that under the law of *Illinois* he "had no power to discharge the petitioner" because "it doesn't appear in this case that the time of sentence has expired", he immediately adds:

> "However, it is this Court's interpretation of the opinion of the United States Supreme Court that the Court should inquire fully into and determine whether the petitioner received a fair trial in the Murder case, or if he was deprived of any of his constitutional rights."

Thus Judge Dusher explicitly declared and squarely held that he had authority to decide this question upon the merits. He did actually decide it upon the merits. It is not material that he conceived his jurisdiction to emanate from this Court's mandate and not from the Illinois Habeas Corpus Act. The point is that Judge Dusher deemed himself vested with jurisdiction to decide the Federal constitutional claims of petitioner. His adjudication as to his jurisdiction, whether correct or not, and if correct, whether

conceived upon the right grounds, was of course not reviewable here.

Therefore when this Court denied *certiorari*, it did so upon a record in which Judge Dusher had remanded petitioner to the penitentiary after an adjudication upon the merits.

If a lower Federal court should not ordinarily reexamine Federal constitutional claims where the merits have once been adjudicated below and this Court has denied *certiorari* (cf. *White* v. *Ragen*, 324 U.S. 760) a State court, even though it be a State Supreme Court, need not reexamine such claims after such denial by this Court.

II.

In the writ of error case the Illinois Supreme Court did not decide, but on the contrary refused to decide, any Federal constitutional question.

The Illinois Supreme Court held on the writ of error case that petitioner had resorted to *habeas corpus* in the circuit court of Winnebago county as means of asserting his claims of constitutional rights, that those claims had there been adjudicated upon the merits, and that the judgment of that court in that proceeding precluded independent review by the Supreme Court of Illinois of the contentions there litigated. This holding embodied only a principle of Illinois' law of appeals and error. It therefore raises no Federal question.

Furthermore, the Illinois Supreme Court has always held that it cannot upon a naked common law record determine whether a convicted person intelligently waived the right

to counsel when he entered a plea of guilty or (in a non-capital case), went to trial without a lawyer. [1]

Of course petitioner's attack upon the mode of impanelling the grand jury that indicted him raises no Federal question.

Therefore this Court should deny *certiorari* with respect to the judgment affirming petitioner's conviction on writ of error.

III.

The Illinois Supreme Court did not review, but on the contrary declined to review, the record made before Judge Dusher. Therefore its decision resolved no Federal question and rests upon an adequate State ground.

Petitioner sought upon an original *habeas corpus* proceeding issued by the Supreme Court of Illinois to obtain a collateral review of the record, findings and judgment in the *habeas corpus* proceeding entertained by Judge Dusher.

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[1] In *People* v. *Carter*, 391 Ill. 594, Carter pleaded guilty to murder without counsel. The Supreme Court of Illinois, having before it only the common law record on a writ of error, affirmed. This Court granted *certiorari* but held that the Illinois Supreme Court's affirmance rested upon a ground of State procedure which precluded review of questions upon an inadequate record, held that that rule of State procedure was not itself unconstitutional, and affirmed without prejudice to Carter's right to seek a full hearing in an appropriate proceeding. Carter later sought and obtained such a hearing, received a full consideration of his constitutional claims upon his evidence *dehors* the record, suffered an adverse adjudication on the questions of fact and obtained review by the Supreme Court of Illinois. (*People* v. *Carter*, 403 Ill. 567.)

True, the Illinois Supreme Court upheld the lower court's findings of *fact*. But it considered Carter's claims upon their merits. This court has recently denied *certiorari* in a memorandum opinion not yet reported.

In *People* v. *Loftus*, 395 Ill. 479, the Illinois Supreme Court, having before it only the common law record, affirmed Loftus' conviction, after Loftus had demanded but had been denied counsel. This Court granted *certiorari*, but dismissed the writ, holding that Illinois' rule inhibiting consideration of the merits of claims upon inadequate common law record was an adequate State ground of procedure not *per se* unconstitutional.

Thus the Illinois Supreme Court's disposition of the instant writ of error rested upon a classical ground of Illinois appellate procedure that has been approved by this Court.

Of course no such review is permissible under the well settled canons defining the scope and office of *habeas corpus.*

The Illinois Supreme Court said, in denying *habeas corpus:*

> "Under Illinois practice any petition which raises question of fact cannot be considered in this Court."

See *People* v. *Loftus,* 400 Ill. 432, to this effect.

It is true that petitioner tendered to the Illinois Supreme Court a transcript of record of evidence heard before Judge Dusher. *But this record presented questions of fact.* Of course the Supreme Court did not defeat its own rule precluding it from entertaining questions of fact by collaterally considering such questions upon a record made in another court. Moreover, to have reviewed Judge Dusher's judgment collaterally would have set at naught the Illinois rule that it cannot review a circuit court's judgment in a *habeas corpus* proceeding.

• • •

Because earlier phases of this litigation have focused attention upon the procedural remedies available in Illinois to review the constitutional validity of the proceedings upon which prisoners were convicted, it is deemed appropriate to indicate to the Court the present situation with respect to the Post Conviction Remedies Statute adopted by the General Assembly of Illinois. (Ill. Rev. Stats. 1949, ch. 38, pars. 826-832.)

In one of the cases instituted under this statute, the Chief Justice of the Criminal Court of Cook County, Illinois, sustained the contention of the State's Attorney and held the statute invalid upon the supposed ground that it invades the sphere of the judiciary, contemplates collateral attack in lower courts upon judgments of the Supreme Court, denies due process in that it permits the

use of affidavits instead of testimony taken in open court and unconstitutionally discriminates in favor of those in penitentiaries and against those in other penal institutions.

It is the position of the Attorney General that the instant act is clearly constitutional in all its aspects and phases and should be sustained. This act was designed in accordance with this Court's dictates to afford a complete remedy to Illinois prisoners and eliminate difficulties which have occurred in the past.

The question of the constitutionality of the act, appropriately raised by a prisoner represented by counsel provided by the Chicago Bar Association, is standing to the March term of the Illinois Supreme Court. The Attorney General, as well as *amici curiae* appearing on behalf of the Illinois and Chicago Bar Associations, will urge the constitutionality of this remedial legislation.

Conclusion.

This Court should, we submit, deny the instant petition for certiorari.

Respectfully submitted,

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